

A **Re Haroun Al-Rashid bin Mohd Yusof,
 ex p Daya Leasing Sdn Bhd**

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO D29-1351-90
FAIZA TAMBY CHIK J

12 FEBRUARY 1996

B *Bankruptcy — Notice — Setting aside — Whether founded upon two separate judgments — Bankruptcy Rules 1969 r 91(2)*

C *Bankruptcy — Petition — Issuing of — Judgment creditor a corporation — Creditor's petition signed by non-designated person — Whether defective — Bankruptcy Act 1967 s 133(a)*

Bankruptcy — Petition — Validity of creditor's petition — Petition not annexed to verifying affidavit as exhibit — Whether failure to annex petition to affidavit was mere irregularity or nullity — Bankruptcy Act 1967 ss 6(1) & 131 — Bankruptcy Rules 1969 r 106

D The appellant appealed against the decision of the learned deputy registrar who had dismissed the application of the appellant which sought to set aside the bankruptcy notice and creditor's petition against him. The appellant contended, inter alia, that: (1) the bankruptcy notice was
E invalid/void because it was issued based upon two judgments; (2) the creditor's petition was not executed by an authorized person under seal of the petitioner; and (3) upon the service of the creditor's petition, the affidavit of truth of statement of petition was not annexed to the creditor's petition.

F **Held**, allowing the appeal with costs:

G (1) It was apparent that there was only one final judgment dated 28 June 1988. The order dated 27 July 1988 was in respect of costs which was the decree of the court itself on 28 June 1988 ordering costs to be paid by the appellant. Therefore, in the case of costs, the effective judgment was the decree of the court on 28 June 1988 itself, and not the order dated 27 July 1988 quantifying the amount (see p 320D-F); *Re Chen Chong Fatt Willy, ex p Hitachi Lease (S) Pte Ltd* [1987] 1 MLJ 94 distinguished.

H (2) Section 133(a) of the Bankruptcy Act 1967 ('the Bankruptcy Act') states that a corporation may act by any of its officers authorized in that behalf under the seal of the corporation. However, in this case there was only an illegible signature of someone without a designation and further there was no evidence in the petition that this non-designated person who signed the petition was lawfully authorized by the judgment creditor to sign the petition. Therefore the creditor's
I petition was defective on this ground (see p 322B-D).

(3) Section 6(1) of the Bankruptcy Act and r 106 of the Bankruptcy Rules 1969 ('the Bankruptcy Rules') require the verification by affidavit with sufficient particularity of the creditor's petition and the

aforesaid petition must be annexed or tied to or bound to or affixed to or stapled to the verifying affidavit so as to avoid any dispute as to what exactly is being verified (see p 322H-I). A

- (4) Section 6(1) of the Bankruptcy Act and r 106 of the Bankruptcy Rules are mandatory and therefore, failure to serve the affidavit of truth of statement of petition on the judgment debtor cannot be taken as mere irregularities that could be cured (see p 323B-C). B

[Bahasa Malaysia summary]

Perayu telah merayu terhadap keputusan yang arif timbalan pendaftar yang telah menolak permohonan perayu untuk mengetepikan notis kebangkrutan dan petisyen pemiutang terhadapnya. Perayu telah menyatakan, antara lainnya, bahawa (1) notis kebangkrutan itu adalah tidak sah/terbatal kerana ia telah diisu berdasarkan dua penghakiman; (2) petisyen pemiutang telah tidak dilaksanakan oleh seorang yang diberikuasa di bawah meterai pempetisyen; dan (3) atas penyampaian petisyen pemiutang, affidavit kebenaran pernyataan petisyen tidak dilampirkan bersama dengan petisyen pemiutang. C D

Diputuskan, membenarkan rayuan itu dengan kos:

- (1) Adalah ketara bahawa terdapat hanya satu penghakiman muktamad yang bertarikh 28 Jun 1988. Perintah yang bertarikh 27 Julai 1988 adalah berkenaan dengan kos yang merupakan dekri mahkamah sendiri pada 28 Jun 1988 yang memerintahkan supaya kos dibayar oleh perayu. Oleh demikian, dalam perkara kos itu, penghakiman yang berkesan adalah dekri mahkamah pada 28 Jun 1988 dan bukan perintah yang bertarikh 27 Julai 1988 yang menentukan amaun itu (lihat ms 320D-F); *Re Chen Chong Fatt Willy, ex p Hitachi Lease (S) Pte Ltd* [1987] 1 MLJ 94 dibeza. E F
- (2) Seksyen 133(a) Akta Kebankrutan 1967 ('Akta Kebankrutan') menyatakan bahawa sebuah perbadanan boleh bertindak melalui mana-mana pegawainya yang diberikuasa dalam kedudukan sedemikian di bawah meterai perbadanan itu. Walau bagaimanapun, di dalam kes ini hanya terdapat satu tandatangan yang sukar dibaca oleh seorang tanpa sebarang gelaran dan tambahan lagi tidak terdapat sebarang keterangan dalam petisyen tersebut bahawa orang yang tidak mempunyai gelaran itu yang telah menandatangani petisyen itu telah diberikuasa secara sah oleh pemiutang penghakiman untuk menandatangani petisyen tersebut. Oleh yang demikian, petisyen pemiutang itu adalah cacat atas alasan ini (lihat ms 322B-D). G H
- (3) Seksyen 6(1) Akta Kebankrutan dan k 106 Kaedah-Kaedah Kebankrutan 1969 ('Kaedah-Kaedah Kebankrutan') memerlukan pengesahan melalui affidavit dengan butir-butir yang mencukupi mengenai petisyen pemiutang dan petisyen tersebut hendaklah dilampirkan atau diikat ataupun dibalutkan atau dilekatkan ataupun dikotakkan kepada affidavit pengesahan untuk mengelakkan sebarang pertikaian mengenai apa yang sebenarnya disahkan (lihat ms 322H-I). I

- A (4) Seksyen 6(1) Akta Kebankrapan dan k 106 Kaedah-Kaedah Kebankrapan adalah peruntukan mandatori dan oleh yang demikian, kegagalan untuk menyampaikan affidavit kebenaran pernyataan petisyen itu kepada penghutang penghakiman tidak boleh dianggap sebagai luar aturan yang boleh diperbetulkan (lihat ms 323B-C).]

B **Notes**

For a case on the authority of person signing the creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1394.

For cases on setting aside bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1410-1424.

- C For cases on validity of creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1519-1529.

Cases referred to

- D *Chen Chong Fatt Willy, Re, ex p Hitachi Lease (S) Pte Ltd* [1987] 1 MLJ 94
Ooi Thean Chuan v Banque Nationale De Paris [1992] 2 MLJ 526

Legislation referred to

- E Bankruptcy Act 1967 (Act 360) ss 6, 91, 131, 133(a)
Bankruptcy Rules 1969 rr 91(2), 106
Subordinate Courts Rules 1980 O 26A

Wan Mohd Zam bin Wan Embong (Prasad Abraham & Associates) for the appellant.

- F *PC Choong (Choong & Co)* for the respondent.

Faiza Tamby Chik J: The notice of appeal in encl 23 is an appeal by the appellant against the decision of the learned deputy registrar who dismissed the application of the appellant dated 1 September 1993 in encl 15 which sought to set aside and/or to strike out the bankruptcy notice dated 13 October 1990 and the creditor's petition dated 29 January 1991. The affidavits in support thereof are in encls 14, 15, 17, 18, 19, 19A, 20, 22A, 21A and 21B.

The grounds of appeal of the appellant are as follows:

- H (a) the bankruptcy notice is invalid/void because it was issued based upon two judgments and this is prohibited by the Bankruptcy Act 1967 ('the Bankruptcy Act');
- I (b) the creditor's petition was not executed by an authorized person under seal of the respondent corporation/petitioner and thus is null and void as well;
- (c) in any event Liew Wai Li, the alleged signatory of the creditor's petition, was at all material times not properly authorized by the respondent corporation to execute and to authorize the issuance of the creditor's petition;

- (d) upon service of the creditor's petition, the affidavit of truth of statement of petition was not annexed to the creditor's petition; A
- (e) the creditor's petition did not take into account the part payment of the sum involved and there was an admission by the petitioner to withdraw the creditor's petition.

The bankruptcy notice B

The bankruptcy notice is in encl 3. It states unequivocally that the appellant/judgment debtor

must pay to Daya Leasing Sdn Bhd (the petitioner) ... the sum of RM42,135.08 being the amount due on a final judgment and order obtained by Daya Leasing Sdn Bhd against you (the appellant) in the Magistrate's Court at Kuala Lumpur in Summons no 82-7514-87 on 28 June 1988 and 27 July 1988 respectively ... (see exhs LWL2 and LWL3 of encl 19). C

Rule 91(2) of the Bankruptcy Rules 1969 ('the Bankruptcy Rules') reads as follows: D

A creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders.

In the case of *Chen Chong Fatt Willy, Re, ex p Hitachi Lease (S) Pte Ltd* [1987] 1 MLJ 94 it was held that a 'bankruptcy petition cannot be founded on two separate judgments even though it may be obtained in the same suit Execution on these two judgments would have to be levied separately'. E

In the instant case it was submitted by the judgment creditor that there was only one final judgment dated 28 June 1988 which was granted pursuant to an application for summary judgment under O 26A of the Subordinate Courts Rules 1980 (see exh LWL2 of encl 19). It was further submitted that the order dated 27 July 1988 (see exh LWL3 of encl 19) was not a final order because it was an order for a given sum payable by the judgment debtor after assessment of costs as provided for in the final judgment dated 28 June 1988. F

The order in terms of the summary judgment dated 28 June 1988 reads as follows: G

IT IS THIS DAY ADJUDGED that the abovenamed second (the appellant) and third defendants do jointly and severally pay the abovenamed plaintiff the sum of ringgit Twenty Three Thousand Nine Hundred and Ninety and Sen Sixty only (RM23,990.60) together with interest on the sum of ringgit Twenty Three Thousand Two Hundred And Fifty Six only (RM 23,256.00) at the rate of 2% per month from 12 November 1986 to the date hereof and thereafter at the rate of 8% per annum to the date of realization and costs of this action including all such fees, expenses, charges and costs (including the abovenamed plaintiff's solicitors' fees on a solicitor-client basis) that may be incurred by the abovenamed plaintiff in recovering all sums owing to it under the lease agreement as may be assessed by this honourable court. H

The terms of the order dated 27 July 1988 are as follows: I

THIS ACTION on 28 June 1988 having been called on for hearing before His Honour, Amdan bin Mat Din, magistrate, Magistrate's Court, Kuala Lumpur in the presence of Mr PC Choong, counsel for the abovenamed plaintiff and in the absence of the abovenamed second and third defendants, WHEREBY IT

- A WAS ADJUDGED inter alia that the abovenamed second and third defendants do pay to the abovenamed plaintiff all such fees, expenses, charges and costs (including the plaintiff's solicitors' fees on a solicitor-client basis) that may be incurred by the plaintiff in recovering all sums owing to it under the lease agreement as may be assessed by this honourable court AND the assessment coming on for hearing this 27 July 1988 before Her Honour, Puan Zakiah Kassim, magistrate, Magistrate's Court, Kuala Lumpur, IT IS HEREBY
- B ORDERED that the abovenamed second and third defendants do jointly and severally pay to the abovenamed plaintiff the sum of ringgit Four Thousand Eight Hundred only (RM4,800) together with interest thereon calculated at the rate of 8% per annum from 27 July 1988 to the date of realization.

- C The bankruptcy notice dated 13 October 1990 against the appellant was in the following terms:

BANKRUPTCY NOTICE

HAROUN AL-RASHID BIN MOHD YUSOF

(NRIC No: 0587149)

- D Lot 369, Jalan 13 1/2
Jalan Cheras
Kajang
43000 Selangor.

- E TAKE NOTICE that within seven (7) days after service of this notice on you, excluding the day of such service, you must pay to DAYA LEASING SDN BHD of 3rd Floor, Wisma 'M', No 66, Jalan Ampang, 50450 Kuala Lumpur, the sum of RM42,135.08 as being the amount due on a final judgment and order obtained by DAYA LEASING SDN BHD against you in the Magistrate's Court at Kuala Lumpur in Summons no 82-7514-87 on 28 June 1988 and 27 July 1988 respectively whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction or the satisfaction of
- F this court, or you must satisfy this court that you have a counterclaim, set-off or cross-demand against the said DAYA LEASING SDN BHD which equals or exceeds the sum claimed by them and which you could not set up in the action in which the judgment was obtained.

PARTICULARS

- | | | |
|---|--|-------------------|
| G | 1. Amount due vide judgment dated 28 June 1990 | RM23,990.60 |
| | 2. Interest on the sum of RM23,256.00 calculated at the rate of 2% per month from 12 November 1986 to 28 June 1988 (594 days)..... | RM 9,083.22 |
| | 3. Interest on the sum of RM23,256.00 calculated at the rate of 8% per annum from 29 June 1988 to 12 October 1990 (836 days) | RM 4,261.26 |
| H | and | |
| | 4. Costs | RM 4,800.00 |
| | | <hr/> RM42,135.08 |

- I Dated 13 October 1990

It is apparent from the terms of the abovementioned judgment, order and notice, that there is only one final judgment dated 28 June 1988. The order dated 27 July 1988 is in respect of costs which is the decree of the court itself

on 28 June 1988 ordering costs to be paid and the order dated 27 July 1988 merely orders the appellant to pay this decreed costs together with interest thereon calculated at the rate of 8% per annum from 27 July 1988 to the date of realization. Therefore it is clear that in the case of costs the effective judgment is the decree of the court on 28 June 1988 itself, not the order dated 27 July 1988 quantifying their amount.

Whether or not the creditor's petition is defective

In the creditor's petition (encl 7) on p 2, it is not shown the designation of the purported person who signed the creditor's petition. It merely shows an illegible signature of someone. Section 133(a) of the Bankruptcy Act states that a corporation may act by any of its officers authorized in that behalf under the seal of the corporation. In other words where a limited company like the petitioner acts, the better way is for one director of the company and the secretary to act in their own names, stating that they are such officers of the company duly authorized under seal. In this case there is only an illegible signature of someone without a designation and further there is no evidence in the petition that this non-designated person who signed the petition was lawfully authorized by the judgment creditor to sign the petition. The petitioner should be prepared at the hearing with proof of the authority (see *William's Law and Practice in Bankruptcy* 17th Ed by Muir Hunder BA p 523). Therefore the creditor's petition in this case is defective on this ground.

The alleged authority of Liew Wai Li

It is contended by the petitioner that the person who signed the petition was Liew Wai Li who was authorized to do so by the petitioner. However it is noted from exh LWL4 of encl 19 that the purported letter of authority was issued by another entity, CI Holdings Bhd, and not the petitioner. Again it is to be noted from the same exhibit that the extract of minutes of the meeting of the board held on 1 September 1984 was signed by one Chan Chun Keong as secretary. However the petitioner admitted in his affidavit dated 18 January 1984 in para 6 of exh LWL7 'Particulars of secretaries for 1987-27 March 1993' that Chan Chun Keong was only a secretary on 27 March 1993. As a consequence of this incontrovertible fact it is reasonable to conclude that Chan Chun Keong could not have signed the minutes of the board on 1 September 1984. Thus the aforesaid minutes dated 1 September 1984 is suspect.

The affidavit of truth of statement of petition

The petitioner admitted in para 27 of their affidavit dated 6 September 1993 in encl 19 that there is no obligation on their part to serve the affidavit of truth of statement of petition on the judgment debtor. Section 6(1) of the Bankruptcy Act and r 106 of the Bankruptcy Rules require the verification by affidavit with sufficient particularity of the creditor's petition and the aforesaid petition must be annexed or tied to or bound to or affixed to or stapled to the verifying affidavit so as to avoid any dispute as to what exactly is being verified; see *Ooi Thean Chuan v Banque Nationale De Paris* [1992] 2 MLJ 526.

It must also be emphasized here that as bankruptcy proceedings are almost quasi-penal in nature, creditors who claim the benefit of the Bankruptcy Act must strictly adhere to its provisions and rules.

A Also there is the question of whether I should regard the shortcomings of the petition in this case as a formal defect or an irregularity which should be cured by the court in its discretion under s 131 of the Bankruptcy Act which states:

B No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

C I am of the opinion that a creditor's petition should fulfil the statutory requirements of the Bankruptcy Act and unless this is done the court should be very chary of curing deficiencies in it by exercising its discretionary power of waiving them. In the instant case I am of the view that s 6(1) of the Bankruptcy Act and r 106 of the Bankruptcy Rules are mandatory provisions and therefore any failure to abide by them cannot be taken as mere irregularities that can be cured. In this case substantial injustice has been caused to the appellant by the shortcomings of the petition whereby a verification by affidavit with sufficient particularity is found wanting.

Part payment and withdrawal

E In para 6 of the affidavit dated 7 September 1993 in encl 19A, the petitioner admitted that payment in the sums of RM21,067.53 and RM8,000 (being agreed costs) were made on or around 23 August 1991 by a third party, ie one Mr Ann Wan Tiam, thereby leaving a balance in the sum of RM21,067.54, and an application to annul and rescind the said receiving order was made and granted on 9 December 1991, without any objection by the petitioner. Further in the same aforesaid affidavit, the petitioner in exh CPC1 promised that

F provided the two aforesaid payments were made, the petitioner would not institute a fresh bankruptcy action against the appellant for the original amount since the amount of the indebtedness would have been reduced.

G I cannot agree with the contention of the appellant on this matter because it is apparent from the bankruptcy notice dated 13 October 1990 itself that the judgment creditor has in fact instituted a fresh bankruptcy action against the appellant based on the reduced amount (see 'Particulars in the bankruptcy notice' hereinbefore mentioned).

For the abovementioned reasons I allow the appeal dated 14 July 1994 in encl 23 with costs.

Appeal allowed.

H

Reported by Ng Kian Pin

I
